



Issue Date: 18 February 2004

BALCA Case No. 2002-INA-297
ETA Case No. P2000-CA-09501099/NDL

In the Matter of:

IRISH PAINTING CO., INC.,
Employer,

on behalf of

BENJAMIN MORA-RAMIREZ,
Alien.

Appearance: Mary Orr, Esquire
Orange, California
For Employer

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Benjamin Mora-Ramirez (“the Alien”) filed by Irish Painting Co., Inc. (“Employer”) pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (“the Act”) and Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”). The Certifying Officer (“CO”) and Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the record upon which the CO denied certification and Employer’s request for review, as contained in the Appeal File (“AF”) and any written arguments of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On January 5, 1999, Employer filed an application for labor certification on behalf of the Alien for the position of Painter. (AF 22-23).

On April 18, 2002, the CO issued a Notice of Findings (“NOF”) indicating the intent to deny the application on the ground that Employer did not appear to have an active business. (AF 18–20). The CO noted that Employer’s tax identification number was inactive and consequently it was not clear that Employer was operating an on-going business. It did not appear that there was an actual job to which U.S. workers could be referred. To remedy the deficiency, the CO advised Employer to document that there was an on-going payroll. Additionally, the CO requested copies of the state’s payroll tax return to show how the Alien was paid. If Employer could not document that the Alien was paid, Employer was requested to indicate how the job was truly open to U.S. workers. (AF 20).

On May 8, 2002, Employer submitted its Rebuttal, consisting of a letter from Employer, a copy of a computer print-out dated October 28, 1999, reflecting a list of employees leased by Employer, a copy of an invoice for leased employees for the two weeks ending April 21, 2002, indicating a gross payroll of \$5,188.00, a copy of a blank EDD registration form and copies of the job advertisement. (AF 5-15). Employer argued that due to the shortage of construction workers, Employer leased workers through an employer resource service, as otherwise it would be required to hire undocumented aliens for the position. Employer would not hire undocumented aliens because it was a violation of the law. (AF 5-7).

Employer stated that when he determined that the Alien was not a legal resident, Employer requested that the employer resource service remove him from their employ until such time as the Alien had the authority to work. Employer then offered the Alien a permanent position if Employer could obtain labor certification on his behalf. (AF 6). Employer noted that according to the EDD application form it submitted, an employer

must pay wages exceeding \$100 in order to obtain a California Employer tax identification number. Because Employer did not have any full-time employees, it could not obtain a tax identification number to provide the CO. Employer also argued that the advertisements for the position established that the job was open to U.S. workers. (AF 6-15).

On July 17, 2002, the CO issued a Final Determination (“FD”) denying certification. (AF 3-4). The CO noted that Employer asserted that it would hire the Alien on a permanent basis after obtaining labor certification. However, the issue was not whether Employer would hire the Alien, but whether Employer had a job opening which was truly open to qualified U.S. workers. The CO added that because Employer leased workers, it was not clear if Employer had a job opening throughout the year or if the position was on an as-needed basis. Additionally, Employer did not document its ability to hire full time employees and failed to demonstrate that it would be able to provide permanent full-time employment to qualified U.S. applicants. (AF 4).

On August 5, 2002, Employer filed its Request for Review, indicating that the CO had a preconceived intent to force Employer to hire undocumented aliens to satisfy the CO’s interpretation of the regulations. (AF 1).

Employer, in its brief dated August 22, 2002, argued that there was a preconceived intent to deny this case, no matter how much documentation Employer provided, simply because Employer did not have its own payroll at the time the case was submitted. Employer noted that it could not supply some of the employment reports because it received employees from an employer leasing service. Employer added that it did not have the Alien on its payroll or on the leasing company’s payroll in order that the labor certification could be pursued without concern of having violated the law. Employer made reference to the employee leasing documents submitted and the job advertisement to demonstrate that it could hire employees and that it had a job opportunity open to any U.S. worker.

DISCUSSION

Twenty C.F.R. § 656.3 defines employment as “permanent full-time work by an employee for an employer other than oneself.” An employer bears the burden of proving that the position is permanent and full-time and if an employer fails to meet this burden, certification may be denied. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988) (*en banc*).

The CO in the NOF questioned the existence of a business operated by Employer. The CO’s doubts were triggered by the fact that Employer’s tax identification number was inactive. (AF 20). To remedy the deficiency, the CO advised Employer to provide rebuttal evidence demonstrating that Employer had an on-going payroll. The CO requested Employer’s most recent California quarterly payroll tax with its corresponding documents and a copy of the Alien’s most recent W-2. Alternatively, the CO requested a persuasive argument as to how the job was truly open to U.S. workers. (AF 20).

If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Denial of certification is proper when an employer fails to provide reasonably requested information. *O.K. Liquor*, 1995-INA-7 (Aug. 22, 1996); *China Inn Restaurant*, 1993-INA-496, 497 (Aug. 26, 1994). An employer's failure to comply with the CO's reasonable request for information regarding ability to pay constitutes a ground for the denial of certification. *The Whistlers*, 1990-INA-569 (Jan. 31, 1992).

The CO in the NOF indicated the deficiencies in Employer’s application and advised Employer of the remedies for the deficiencies. Employer argued that due to the limited number of available employees in the construction field, it had to resort to leasing

employees. Therefore, Employer was not required to file any of the requested documents. Employer's alternative evidence to the payroll reports requested by the CO was a single invoice for leased employees for the two week period ending April 21, 2002, as well as a payroll roster of leased employees dated October 28, 1999. (AF 5-17).

The burden of proof in the twofold sense of production and persuasion is on the employer. *Cathay Carpet Mills, Inc.*, 1987-INA-161 (Dec. 7, 1988) (*en banc*). An employer bears the burden in labor certification both of proving the appropriateness of approval and ensuring that a sufficient record exists for a decision. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). An employer's last opportunity to supplement the factual issues of the case is in the rebuttal. 20 C.F.R. § 656.24. Therefore, it is an employer's burden at that point to perfect a record that is sufficient to establish that certification should be granted. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*).

Employer wasted its opportunity to remedy the deficiencies in its Rebuttal by providing only two documents in its attempt to comply with the CO's request. Employer's minimalist approach to the submission of evidence was particularly deficient because it failed to demonstrate that it had an on-going business, as the documents had a gap in time of over two years. (AF 9-11). Employer had the opportunity to present either documentary evidence establishing an on-going business or an argument as to how the job was open to U.S. workers. (AF 20). Employer failed to present either and instead relied upon his bare assertion that he used a leasing service to provide employees due to a shortage of qualified workers in the area. This assertion failed to address the CO's concern, the on-going nature of Employer's business.

As indicated by the CO, Employer's business could easily be a seasonal business and as such, could not provide permanent employment to a U.S. worker. Consequently,

because Employer failed to produce sufficient documentation or persuasive argument in support of its position, the denial of the labor certification was proper.

ORDER

For the reasons stated above, the CO's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the Panel by:

A

Todd R. Smyth
Secretary to the Board of Alien
Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five,